Supreme Court, U.S.
FILED
MAY 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1627

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

MOTHER AND UNBORN BABY CARE
OF NORTH TEXAS, INC., and
CHARLES J. PELLETIER, II,

Petitioners,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SECOND APPELLATE
DISTRICT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a person have a First Amendment right to advertise and represent falsely that he provides abortion services in order to lure pregnant women seeking abortions to his place of business where he can then force on them his views in opposition to abortion?

2. Does a state have the right to regulate the manner in which commercial speech may be made and the manner in which conduct may be carried out by that speech?

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

Respondent the State of Texas respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Appeals of Texas (Second Appellate District).[1] That opinion is reported at 749 S.W.2d 533 (Tex. Ct. App. 1988), and is reproduced in Pelletier's Appendix at 2a *et seq.*.

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1 Petitioners will be referred to as "Pelletier" and respondent will be referred to as "the State."

STATEMENT OF FACTS

Pelletier operated the "Problem Pregnancy Center," dedicated to persuading pregnant women not to have abortions. Pelletier placed advertisements in the Fort Worth Yellow Pages, under the heading "Abortion Information and Services" (PX-1 and 2). He chose a "neutral" name for his Center to attract women who otherwise "may not come to the center if the center appears to be pro-life" (S.F. 76). Pelletier's efforts had the desired effect. During the seven-month period from January 1 to July 28, 1986, 1090 women came into the Center and gave information on the basis of which intake forms were filled out (PX-332; S.F. 311-313). Of these women, 505 were lured by the Yellow Pages advertisements (PX-332; S.F. 311-313). Most of these women were considering an abortion (PX-333; S.F. 314).

Before they realized that the Center was not an abortion clinic, these women provided highly personal medical and other information to Pelletier. As a direct result of Pelletier's actions, many of these women suffered severe emotional distress.

The record of the jury trial is replete with the experiences of pregnant women who were tricked into going to Pelletier's Center by Pelletier's deceptive representations. A brief summary will suffice to show the Court the facts on which the trial court's judgment was based, and on which the appellate courts relied in affirming that judgment.

One woman called to ask how much the Center charged for abortions. The receptionist said: "Well, it really depends how far along you are in your pregnancy and what procedure, but basically it's $200.00 and up." (S.F. 5-6, 22). Not until this woman had gone to the Center, filled out an intake form, talked to Pelletier and sat through part of a slide presentation did she realize that the Center was not an abortion clinic (S.F. 12). A second woman asked, "Do you do abortions?" and the receptionist responded, "Yes, we do." (S.F. 372). Another woman asked, "do you all do the

abortion?" (S.F. 287), and was told "We have doctors that we work with that will give you what you need." (S.F. 287). Pelletier later defended that response by saying that the woman did not "need an abortion" (S.F. 288-289).

Because he views himself as being in competition with abortion clinics (S.F. 78, 94-95, 183, 192), Pelletier used the tactics of avoidance, evasion and concealment to draw in as many women considering an abortion as possible (S.F. 101-104, 164-165, 183), to force them to hear his message without regard to their willingness or need to hear it.

Following a jury verdict for the State, the trial court entered a judgment granting the permanent injunction sought by the State. The trial court found as a matter of law that the State was entitled to a permanent injunction to stop Pelletier's deceptive practices pursuant to its request to proceed in *parens patriae* on a cause of action for equitable relief (Appendix at 2a), in addition to the State's cause of action for injunctive and other relief pursuant to the Texas Deceptive Trade Practices Act, TEX. BUS. & COM. CODE § 17.41 *et seq.* ("DTPA").

Pelletier appealed from the cause of action based on the DTPA, but did not appeal from the *parens-patriae*-based cause of action for equitable relief.

The Court of Appeals for the Second Appellate District of Texas affirmed the trial court judgment. Pelletier's Appendix at 2a. The Supreme Court of Texas denied Pelletier's application for writ of error, finding no reversible error in the decision of the Court of Appeals. Pelletier's Appendix at 23a. Therefore, although Pelletier has properly sought review of the Court of Appeals decision, in fact the Texas Supreme Court has also reviewed and rejected Pelletier's claims.

REASONS WHY THE PETITION SHOULD BE DENIED

The sole issue in this case is whether Pelletier has a Constitutional right to lie to pregnant women, to entice them into a fake abortion clinic, and thereby to cause them harm. That is in fact what Pelletier set out to do, and what he accomplished.

The State agrees that this road to deception was paved with good intentions. There is no question that Pelletier was motivated by his sincere religious beliefs. The State acting as *parens patriae* has simply prevented Pelletier from forcing his beliefs on unwilling listeners.

1. There is no conflict with other decisions.

Pelletier has satisfied none of the Court's considerations governing review on writ of certiorari. SUP. CT. R. 17. The decisions of the Texas state courts do not conflict with a decision of any other court, state or federal. SUP. CT. R. 17.1.a & 17.1.b. Indeed, just the opposite is the case. Other state courts have ruled similarly. *See, e.g., Fargo Women's Health Organization v. Larson*, 381 N.W.2d 176, 181 (N.D. 1986), *cert. denied*, 106 S.Ct. 1957 (1986). *Cf. Molko v. Holy Spirit Association for the Unification of World Christianity*, 252 Cal. Rptr. 122, 137 (1988); and *Bering v. Share*, 721 P.2d 918, 925 (Wash. 1986). Pelletier has not pointed this Court to any federal decisions which create a conflict, nor has the State discovered any.

2. This case does not involve an important question of federal law that requires review by this Court.

The Court may also grant Pelletier's petition if Pelletier can demonstrate that the state appellate courts decided an important question of federal law that should be settled by this

Court, or that conflicts with an applicable decision of this Court. SUP. CT. R. 17.1.c. Apparently, that is what Pelletier has sought to do with his extended discussion of *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 107 S.Ct. 616 (1986). However, aside from the fact that the defendant in that case also opposed abortion, that case bears no relevance to the Court's consideration of this case, and certainly sets up no conflict. Unlike Pelletier, Massachusetts Citizens for Life, Inc. was engaged in "core political speech" when it published and distributed a newsletter. 107 S.Ct. at 624. There was no evidence that the speech was forced on anyone through trickery. Further, there were no allegations or proof that the speech at issue in that case was commercial or deceptive, as the jury found here. Deceptive commercial speech is not protected by either the United States or Texas Constitutions. *Friedman v. Rogers*, 440 U.S. 1, 9 (1979); *Clark v. State*, 665 S.W.2d 476, 482 (Tex. Crim. App. 1984).

More relevant to consideration of the merits of this case is the Court's opinion in *Frisby v. Schultz*, 108 S.Ct. 2495 (1988). At issue in *Frisby* was the constitutionality of an ordinance making it unlawful to picket a residence. The appellees were anti-abortion protestors who picketed the home of a local physician who worked in an abortion clinic. The Court held that the ordinance was not facially invalid, because it was content-neutral and because the appellees had alternative channels of communicating. The appellees had not sought to communicate their message to the general public, but instead chose to intrude upon the privacy of one person. Writing for the majority, Justice O'Connor said, "There simply is no right to force speech into the home of an unwilling listener." 108 S.Ct. at 2502.

The Court's reasoning in *Frisby* applies equally here. The DTPA is concededly valid on its face (Petition at 12), and

it certainly is content-neutral.[2] In fact, the ordinance in *Frisby* was specifically adopted to regulate one form of fully-protected speech, and the DTPA is aimed, at most, at commercial speech. Just as the appellees in *Frisby*, Pelletier has many alternative channels of getting his message across short of deceit and invasion of the privacy of women who, as in *Frisby*, are unwilling listeners. Indeed, the restrictions placed on Pelletier by the judgment are closely akin to the time-and-place restrictions which this Court has long recognized may be imposed even on fully-protected speech. *Frisby*, 108 S.Ct. at 2507 (BRENNAN, J., dissenting). Most important, the Court recognized that an individual's right to be let alone is as important, in some instances, as another individual's speech rights. *Frisby*, 108 S.Ct. at 2504.

The State is not, and never should be, in the business of dictating the content or conduct of free speech. But when speech is intermingled with apparently commercial conduct, when that conduct is intrusive and coercive, and when that conduct is deceptive and misleading, the State may act, and indeed must act, to stop the conduct and to protect the rights of the women at whom that conduct is aimed. This is a compelling interest, as the court of appeals concluded. *Mother & Unborn Baby Care of North Texas, Inc. v. State*, 749 S.W.2d 533 (Tex. Ct. App. 1988) [Pelletier's Appendix at 14a]. *See Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978).

The injunction in this case, and the law on which it was based, are fully within the rights of a state to regulate activity within its borders, especially activity that causes harm

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[2] The State did not base any aspect of its suit on whether or not the information provided to women, after they had been tricked into coming to the Center, was itself misleading or deceptive, specifically because the State did not wish to challenge the content of the actual speech.

to its citizens. Pelletier has demonstrated neither a conflict of decisions nor a need otherwise for this Court to devote its resources to a reconsideration of the merits of a case which has already been upheld by two state appellate courts.

3. Reversal of the state courts' decisions on the issues raised by petitioners will not vitiate the judgment.

The question of the validity of the trial court judgment is now moot. Pelletier's appeal never addressed the right of the state to obtain equitable relief as *parens patriae*. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). Because Pelletier did not appeal from this aspect of the judgment, the right of the State to obtain the injunction as *parens patriae* was never before the state appellate courts, and is not before this Court. Therefore, even were this Court to grant the petition and reverse on the grounds urged by Pelletier, such a reversal would not vitiate the judgment.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX
[JUDGMENT OF THE TRIAL COURT]

No. 67-99153-86

STATE OF TEXAS,	§	IN THE DISTRICT
	§	COURT OF
Plaintiff,	§	TARRANT COUNTY,
vs.	§	TEXAS
MOTHER & UNBORN	§	
BABY CARE OF NORTH	§	
TEXAS, INC.,	§	67TH JUDICIAL
AND CHARLES J.	§	DISTRICT
PELLETIER, II,	§	
Defendants.	§	

JUDGMENT

On the 29th day of September, 1986, came on for hearing the above-styled and numbered cause. All parties appeared through their attorneys of record and announced ready for trial. Defendant Charles J. Pelletier, II, appeared in person and as the representative of Defendant, Mother and Unborn Baby Care of North Texas, Inc. d/b/a Problem Pregnancy Center and Problem Pregnancy Center Abortion Action Affiliates. A jury having been previously demanded, a jury consisting of twelve good and lawful jurors was duly empaneled and the case proceeded to trial. At the conclusion of the evidence, the Court submitted the case to the jury on special issues. The charge of the Court, including the special issues and the verdict of the jury, are incorporated herein by reference for all purposes. It appears to the Court that the verdict of the jury was for the Plaintiff and against the Defendants and the Court is of the opinion, therefore, that judgment should be rendered upon the verdict in favor of the Plaintiff and against the Defendants. As to certain matters not submitted to the jury, the Court finds as a matter of law as

follows: 1. Consumers in the State of Texas will suffer irreparable injury for which they have no adequate remedy at law if Defendants Mother and Unborn Baby Care of North Texas, Inc. ("the corporate Defendant") and Charles Pelletier are not enjoined from engaging in the acts and practices set out herein. 2. Plaintiff is entitled to the permanent injunction sought in its Amended Petition, Information in Quo Warranto, and Petition for Civil Penalties pursuant to section 17.47 of the Texas Deceptive Trade Practices -- Consumer Protection Act, Tex. Bus. & Comm. Code §§17.41 et seq. (the "DTPA"). 3. Plaintiff is also entitled to this permanent injunction pursuant to its request to proceed in this case as parens patriae. 4. The corporate Defendant is the alter ego of Defendant Charles J. Pelletier, II, and adherence to the fiction of separate existence of the corporate Defendant would sanction a fraud and promote injustice. 5. The individuals who have worked for the Defendants as volunteers, counselors, receptionists or in any other capacity, whether paid or unpaid, have acted as Defendants' agents. 6. Consequently both of the Defendants are legally responsible for the past, present and future acts of these individuals performed or to be performed in the course and scope of their work on behalf of the Defendants. 7. The corporate Defendant is a corporation duly organized under the laws of the State of Texas. 8. The corporate Defendant has, since, 1984, abused its corporate powers and privilege to do business as a corporation in the State of Texas by violating the DTPA, perpetrating fraud, and exercising powers not conferred upon it by law. 9. These acts amount to a forfeiture of the corporate Defendant's rights and privileges to exercise its corporate franchise in the State of Texas. 10. Defendants have failed in all respects to maintain procedures reasonably adapted to insure compliance with the temporary injunction orders entered by this Court pursuant to section 17.47 of the DTPA.

Having considered the motions for judgment of the Plaintiff and the Defendants, the Court enters the following judgment:

IT IS ORDERED, ADJUDGED AND DECREED that Defendants Mother and Unborn Baby Care of North Texas, Inc. and Charles J. Pelletier, II, their agents, officers, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise, are hereby permanently enjoined from directly or indirectly engaging in the following acts and practices:

A. Passing off Defendants' services as those of another, including, but not limited to, representing directly or by implication that Defendants provide medical services, abortion assistance, abortion referrals, or abortion services, or by failing to answer questions regarding these matters fully and truthfully;

B. Causing confusion or misunderstanding as to the source, sponsorship, or approval of Defendants' services, including, but not limited to, representing directly or by implication that Defendants provide medical services, abortion assistance, abortion referrals or abortion services, or by failing to answer questions regarding these matters fully and truthfully;

C. Representing directly or by implication that Defendants' services have characteristics, uses, or benefits which they do not have, including, but not limited to, representing directly or by implication that Defendants provide medical services, abortion assistance, abortion referrals, or abortion services, or by failing to answer questions regarding these matters fully and truthfully;

D. Advertising services with the intent not to provide them as advertised, including, but not limited to, advertising that Defendants provide medical services, abortion assistance, abortion referrals, or abortion services, and advertising

under any heading or classification which contains these phrases;

E. Representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, including, but not limited to, representing directly or by implication that Defendants provide medical services, abortion assistance, abortion referrals or abortion services, and failing to answer questions regarding these matters fully and truthfully;

F. Failing to inform persons who contact Defendants that Defendants do not provide medical services, abortions, or abortion referrals, and that Defendants do not operate an abortion clinic; and

G. Failing to include in any advertisements placed by Defendants in any medium the following language: "Not an abortion clinic. No abortions, abortion referrals or medical services provided."

The disclosures required by subparagraph F, above, shall be made at the time of the first contact with Defendants or their agents, whether by telephone or in person. The disclosures shall be made as soon as either party to the contact mentions any of the following:

1. abortion,
2. appointment,
3. pregnancy test,
4. cost or price,
5. financial assistance or aid,
6. insurance,
7. ~~information,~~ G.A.C.*

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* Item 7 was deleted in the original by the trial judge, who then initialled the deletion.

8. counseling,
9. referral, or,
10. medical services.

In no event shall Defendants or their agents begin counseling or obtain information from persons contacting them unless and until the disclosures required by subparagraph F have been made.

The language required by subparagraph G, above, to be included in print advertising shall be in a size equal to at least 10-point bold type, but in no event shall the type be smaller than the smallest type used in the advertisement. Such language shall be recited in any television or radio advertising placed by Defendants.

Nothing in this Judgment shall prohibit Defendants from advocating their beliefs with respect to abortion so long as their conduct towards consumers is not false, misleading or deceptive.

IT IS FURTHER ORDERED that the charter and privilege of the corporate Defendant to operate as a corporation in this State will be revoked and the corporation will be dissolved upon a finding by the Court that the corporate Defendant has failed to comply with any term of this Judgment.

IT IS FURTHER ORDERED that Charles J. Pelletier, II, shall not hereafter act as an incorporator, officer, director, shareholder, agent or employee of, or otherwise be affiliated with, any corporation which engages in any of the acts or practices prohibited herein.

IT IS FURTHER ORDERED that the State of Texas recover from Defendants, jointly and severally, the amount of $39,000 in civil penalties.

IT IS FURTHER ORDERED that the State of Texas recover from Defendants, jointly and severally, the sum of $49,025 as reasonable attorneys' fees for services rendered through the trial of this case, the further sum of $10,000 if this case is appealed to the court of appeals, the further sum of $5,000 for making or responding to an application for writ of

error to the Supreme Court of Texas, and the further sum of $5,000 if writ of error is granted, all pursuant to article 3917, Tex. Rev. Civ. Stat. Ann.

IT IS FURTHER ORDERED that all sums of money adjudged herein shall bear interest at the rate of 10% per year from the date of judgment until paid.

IT IS FURTHER ORDERED that Defendants, jointly and severally, are assessed all costs of Court herein.

IT IS FURTHER ORDERED that Defendants shall give a copy of this Judgment to each and every person who works for or with either Defendant as a volunteer, counselor, receptionist, or in any other capacity, whether presently or in the future, and that Defendants shall obtain and file with this Court an executed copy of the Acknowledgement attached hereto as Exhibit "A" from each of these persons within one week of the date of the Judgment or within three days of the individual's first day of work for either Defendant. Defendants shall not allow any person to work for or with either Defendant unless that person signs the Acknowledgement.

IT IS FURTHER ORDERED that the State of Texas have all writs of execution and other process necessary to enforce this Judgment.

SIGNED this 14th day of November, 1986.

/s/ George A. Crowley
JUDGE PRESIDING.

[Exhibit "A" omitted.]